SUPREME COURT, U.S.
FILED
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No. 01-285

In the Supreme Court of the United States

MARYELLEN THOMS, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. The petition shows, and respondent appears to concede, that the Sixth Circuit's holding that 8 U.S.C. 1226(e) (1994) is unconstitutional as applied to respondent created a conflict among the courts of appeals and presents a constitutional question "of national significance." Br. in Opp. 8; see Pet. 14-25. Respondent nevertheless argues (Br. 8) that this case "*no longer* presents an issue worthy of this Court's attention" (emphasis added) because, on October 11, 2001, the Sixth Circuit issued an opinion in *Carballo* v. *Luttrell*, No. 99-5698, 2001 WL 1194699. The panel opinion in *Carballo* held—consistent with the position of the government in the certiorari petition—that the court of appeals' decision in this case "cannot survive the Supreme Court's decision in *Zadvydas* [v. *Davis*, 121 S. Ct. 2491 (2001),] and that under the analysis of [*Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953),] the Fifth Amendment does not present an obstacle to the potentially indefinite detention of an excludable alien."

2001 WL 1194699, at *14. Respondent asserts (Br. 7-8) that the petition should be denied in light of the panel opinion in *Carballo*.

On November 23, 2001, however, the Sixth Circuit granted a *sua sponte* call for rehearing en banc in *Carballo* and vacated the decision and judgment of the panel in that case. App., *infra*, 1a-2a. The Sixth Circuit's judgment in this case still stands. Respondent's principal argument against granting the petition—that the Sixth Circuit has itself corrected the error identified by the government—thus fails. Unless the erroneous decision of the court of appeals is vacated by this Court, it will be the law of the Sixth Circuit and the courts of appeals will be in conflict.

The possibility that the Sixth Circuit might change its position at some future time, in the *Carballo* case or otherwise, does not warrant leaving the judgment in this case standing, especially where the court of appeals has held an Act of Congress unconstitutional. That is all the more true because the government's petition does not seek plenary review, but rather requests only that the judgment of the court of appeals be vacated and the case remanded to that court for further consideration in light of *Zadvydas*. It should be noted that if the court of appeals' constitutional holding in this case were allowed to stand, and if the en banc Sixth Circuit then held in *Carballo* that the alien's detention was impermissible on statutory grounds, then the panel's erroneous decision in this case would remain as circuit precedent on the constitutionality of an Act of Congress that does authorize continued detention in a case such as this.

2. Respondent further argues (Br. 8-9) that respondent's release on immigration parole pursuant to conditions imposed by the Immigration and Naturalization

Service (INS) lessens the importance of this case because it is equivalent to the habeas relief awarded by the court of appeals. That is incorrect. In respondent's own view (Br. 9), the court of appeals' decision prevents the INS from returning respondent to custody for violating the terms of his immigration parole. See generally 8 C.F.R. 212.12(h)(2); *Zadvydas*, 121 S. Ct. at 2504 (noting that aliens may be returned to custody based on violation of conditions of release). Respondent asserts (Br. 9) that the government would have to commence and prevail in a new criminal prosecution before it could take him back into detention. Given that respondent has twice before violated the terms of immigration parole, see Pet. 4-5, 7-8, the government's ability to protect the public against possible additional wrongdoing by enforcing respondent's conditions of release is a matter of considerable significance.

3. Respondent next claims (Br. 9-10) that the mootness issue in this case is not "in itself" sufficient grounds to grant the petition. *Id.* at 10. We do not suggest that a remand would be warranted solely so that the court of appeals could reconsider its mootness holding in light of respondent's release on parole. But given the court of appeals' error in holding an Act of Congress unconstitutional, which has *not* been corrected, the changed factual circumstances relating to mootness provide an additional reason why vacating and remanding is appropriate. See Pet. 22-24.

4. The petition answered respondent's subsidiary contention that the court of appeals' constitutional holding does not actually conflict with *Zadvydas* and *Mezei*. See Pet. 15-19. Indeed, respondent's arguments that the *Zadvydas* Court expressed no view on the application of its decision to excludable aliens (Br. 10) and that the Court's holding in *Mezei* turned on

"particular national security concerns" (*id.* at 11) are meritless. This Court held in *Zadvydas* that "a basic territorial distinction" separated the removable alien in that case from the excludable alien in *Mezei*, 121 S. Ct. at 2501, and that this territorial distinction "made all the difference" in due process analysis, *id.* at 2500. The court of appeals should be given an opportunity, on remand, to recognize the critical constitutional difference between deportable aliens and aliens denied admission, and to bring its jurisprudence into line with that of every other court of appeals that has considered the constitutionality of detaining the latter group of aliens under former Section 1226(e). See Pet. 19-20 (citing cases); see also *Ma* v. *Ashcroft*, 257 F.3d 1095, 1106-1109 (9th Cir. 2001) (after *Zadvydas*, relying on constitutional distinction between detention of aliens admitted to United States and aliens not admitted).

5. Finally, respondent's argument (Br. 11-14) that his detention is governed by 8 U.S.C. 1231(a)(6) rather than 8 U.S.C. 1226(e) (1994) counsels *in favor of* granting the petition and remanding for further consideration in light of *Zadvydas*. The court of appeals held (Pet. App. 20a-21a) that respondent's detention was authorized by former 8 U.S.C. 1226(e) because respondent was in exclusion proceedings before the April 1, 1997 effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(1), 110 Stat. 3009-625. See Pet. App. 20a-21a. It then held Section 1226(e) unconstitutional as applied to respondent. *Id.* at 27a-48a. If it were true, as respondent argues, that *Zadvydas* has implications for the court of appeals' predicate statutory holding, then granting the government's petition would allow the court of appeals to consider the issue in the first instance.

Furthermore, even if 8 U.S.C. 1231(a)(6) were the relevant statutory provision in this case, it would not follow that respondent's detention violates the requirements of that section. Only the dissenting Justices in *Zadvydas* raised the prospect that the construction of Section 1231(a)(6) announced in that case might apply equally to aliens whose situation does not implicate the same constitutional concerns that animated the Court's interpretive approach. See 121 S. Ct. at 2512-2513 (opinion of Kennedy, J., dissenting). The petition explains (at 17-18 n.4) why the statutory analysis of the *Zadvydas* majority does not apply in the case of an excludable alien. Detention of such an alien does not raise the constitutional question that the Court confronted in *Zadvydas*, see 121 S. Ct. at 2498-2502, and continued detention itself accomplishes the purpose of effectively excluding the alien from the United States. There would, moreover, be additional statutory grounds, independent of Section 1231(a)(6) and not addressed by the dissenting Justices in *Zadvydas*, for continuing to detain respondent. See Pet. 18 n.4 (discussing 8 U.S.C. 1182(d)(5)(A)).

* * * * *

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the question of mootness and for further consideration of the merits in light of *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5698

REYNERO ARTEAGA CARBALLO,
PETITIONER-APPELLANT

v.

MARK LUTTRELL, WARDEN; AND IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS-APPELLEES

[Filed: Nov. 23, 2001]

BEFORE: MARTIN, Chief Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

Pursuant to Sixth Circuit I.O.P. 35(c), a majority of Judges of this Court in regular active service have voted to grant the request of a member of this Court for rehearing of this case en banc,

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will scheduled this case for oral argument as directed by the Court.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN, Clerk
LEONARD GREEN, Clerk